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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 55.

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

APPLICATION FOR RE-HEARING.

1. Now comes the respondent in this case, and applies to the Court for a re-hearing, and respectfully suggests to the Court that the decision heretofore rendered, on December 7, 1931, is erroneous, for the reason that this Honorable Court has failed to recognize the sovereign rights of the State of Ohio.

2. In making this application for re-hearing we feel that possibly it was made to appear to your Honors that the authority of the Federal Bankruptcy Court was the sole object of consideration in this case; and possibly, being a Federal Court itself, the Supreme Court failed to consider the effect that such an extension of the powers of the Bankruptcy Court has upon the rights and powers of one of the sovereign states. This decision affects not only Ohio but each state which provides a lien upon real estate for its taxes. In argument of this case, we had considered that our main function was to present the facts to the

gage holder could secure a lien upon the property of the mortgagor, there would be no validity or value to a mortgage. In fact, The Union Trust Company in this case relied upon the laws of the sovereign state of Ohio for the binding effect of its mortgage. Were it not for the existence of the sovereign State of Ohio, and were it not for the authority which the state possesses and exercises through its various officers, and especially through the maintenance of the county sub-divisions, and the various officers in these sub-divisions,—were it not for these things, the claims of The Union Trust Company, founded upon its mortgage, would have been valueless.

State Ought Not Be Required to Compete on Common Ground with Creditor.

8. Now, the State of Ohio must maintain its authority, and it can only do so because it receives revenue for that purpose. The petitioner, therefore, in attacking the right of the State of Ohio to secure its revenues, is attempting, by the aid of this Court, to destroy the very power on which he himself must rely for the protection of his rights. In other words, when, at the request of the petitioner in this case, this Court places the claim of a citizen of the state on a par with the claim of the sovereign state itself, it is both neglecting the sovereign character of the state's claim, and, by causing the state to compete with its subjects, it is depriving the state of the opportunity of protecting these same subjects.

United States Should Uphold State of Ohio.

9. When we apply to this Court, in the name of the State of Ohio, we do so with the firm belief that it is the duty of the federal courts, and of the federal government, to uphold the sovereign nature of the state's claims. The

state must exist for the protection of its subjects, unless the federal government expects to take over and regulate every branch of human affairs.

Bankruptcy Act Recognized Tax Claims.

10. In this case may we again call the Court's attention to the fact that, by the terms of the Bankruptcy law, the sovereign claims of the state to taxes have been expressly excluded from the operation of the bankruptcy statute. In other words, the United States Government, by its Congress, in the enactment of the bankruptcy law, expressly enacted that this law should not affect taxes[4]; and expressly protected the revenues of state governments by ordering them to be paid[5]; and by allowing only an inquiry with respect to the amount or the legality of any tax before ordering its payment.

Sovereign Never Consented that Tax Liens Be Questioned.

11. It is a familiar principle of law that the sovereign cannot be sued, unless it has provided a method, and specifically authorized such a suit. The State of Ohio has provided only one method of attacking the claim of the state for taxes, and that is by injunction on the ground of illegality.[6] No method is anywhere provided for attacking the priority of the tax liens, which is a separate matter from either the amount or legality of the tax. The State of Ohio has never admitted any doubt or right to dispute its priority in claims for its revenues, where those revenues are valid; nor has the State authorized any method by which tax liens can be transferred to any fund, or removed, from the property, other than by payment. Since the

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[4] Section 35, Title 11, United States Code.
[5] Section 104(a), Title 11, United States Code.
[6] Sections 12075 *et seq.*, Ohio General Code.

sovereign state has never granted its courts power to deprive it of its lien, is it not entitled to the protection of the federal courts, in the same manner that it is entitled to protection in the state courts?

State Protected Collection of Taxes.

12. Now, the Supreme Court bases its decision on the right of the bankruptcy court to sell property free and clear of all liens. If such power is an equitable power, then it exists in the State of Ohio, the same as it exists in courts of other states; but the State of Ohio protects its taxes by requiring them to be paid from the proceeds of the sale of the property.[7] The State of Ohio likewise provides that the lien of the state for taxes shall continue until paid.[8] Ohio has never given, nor have its courts assumed authority to interfere with the tax lien.[9] In fact, Ohio courts under equity practice have determined that the treasurer need not concern himself with equitable suits wherein the foreclosure of mortgages, and the marshalling of liens are concerned.[9] It never has been the practice in Ohio for the Treasurer to come into foreclosure suits to protect the lien of his taxes.

Equity Procedure Never Interfered with Tax Liens.

13. The Courts of Ohio, and of every other state, have exercised equity jurisdiction in the marshalling of liens since their creation. Every state which authorizes tax liens protects these liens at a judicial sale of property, by requiring taxes to be first paid from the proceeds of that sale. In practice, each such judicial sale is "free and clear of encumbrances," as far as mortgages and other such claims are concerned. But never have state courts assumed

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[7] Section 5692, Ohio General Code.
[8] Section 5671, Ohio General Code.
[9] *Security Trust Co. vs. Root*, 72 O. S. 535.

that their equitable powers extended to the setting aside of their sovereign's rights. Now, will the decision in this case enlarge the general scope of equitable jurisdiction? Is it necessary or desirable to interfere with settled practice?

No Federal Precedent.

14. In federal procedure, of course, there is no precedent in this line, except, perhaps, the cases mentioned in bankruptcy practice. The United States Government has no direct taxes levied upon real estate. In fact, the Federal Courts, as far as we are informed, do not exercise jurisdiction in the foreclosure of mortgages, because this jurisdiction has been left to the states, through whose authority mortgage liens have been authorized.

Bankruptcy Practice Not Binding as Law.

15. It is true that the bankruptcy courts in some instances have assumed the power to sell land free and clear of all encumbrances, including taxes. This, however, does not necessarily prove that such is the law. In fact, in all the reported cases the courts have almost invariably required that the taxes be paid in some manner. As long as the taxes were paid, the various states interested had no quarrel with the dicta of the judge rendering the opinion. Only in an instance of this kind, where this matter is actually brought to the attention of the federal courts, may it be said that a decision of the Court will become authority for such a proposition of law.

Disregards Ohio's Rights.

16. Now, the federal government comes into the State of Ohio, and disregards entirely the provisions which the State of Ohio has authorized for the security of its revenues in foreclosure cases, and allows real estate in the State of

Ohio to be sold free from the lien of these revenues. The Bankruptcy Act itself does not authorize such a procedure. The laws of the State of Ohio do not authorize such a procedure. The principle of the Federal Practice Act, that courts shall follow the laws of the state in which they exist, does not authorize such procedure. Upon what principle then must a decision of this kind be based?

Priority a Non-Controversial Matter.

17. The sole object of consideration in this case is a non-controversial matter; *i.e., The lien upon real estate for taxes takes priority over every other claim.* Never has this matter been disputed in Ohio, never in any other state, so far as our research can find, and never by the Federal Courts. We are not speaking now of any illegality, of course, because we may assume the tax legal until its legality is questioned. In this case petitioner admits that the state's lien should be prior to the mortgage. Since, therefore, there is no disputed question of law on the subject of priority of the tax liens, why is it necessary to extend the court's jurisdiction? Why is it necessary to make a controversial, out of a non-controversial, matter? What good is accomplished by requiring the Treasurer to always be watching the Bankruptcy Court, to see that he secures proper protection? Why can he not, as in the past, rest secure on settled practice that the sovereign's revenues will be protected? If there were a controversial question on each claim, then he should be required to protect his interests; but when his time and expense would be required solely to see that the Federal Court does not make a clerical error, as it were, on an undisputed question, it seems unnecessary to place such an additional burden upon him. In other words, since a non-controversial question is involved, since tax liens on real estate are admittedly prior to other liens, we believe that no good is accomplished by making a

controversy of it; and we further believe such was the whole intent of the Bankruptcy Act in permitting the Court authority to determine only questions of amount or legality of taxes, and otherwise requiring payment.

Question of Advisability.

18. Is it necessary to place the state government at a disadvantage solely for the sake of extending the power of the federal courts?

Unnecessary Hardship on State.

19. Speaking from the standpoint of the state government, we cannot see that the benefit gained to the federal court is a drop in the bucket, compared to the detriment to the power of the state government. Why should the bankruptcy court be authorized to render an "erroneous" decision, which will take the revenues away from the State? If this power is authorized to the bankruptcy courts, will it not be frequently used? May we not suppose that, in the multitude of cases there will be other decisions as clearly "erroneous," and as clearly prepared for the benefit of some private creditor who wants to collect his claim in preference to the taxes due his sovereign? Must we place the burden upon the treasurer of the county, to expend the time and the state's money in traveling back and forth from his county seat to the bankruptcy court, for the sole purpose of preventing an error of the referee? It were better if the referee were informed by the decision in this case that such errors would not be recognized. As a public officer, the treasurer ought to be able to rely upon the validity of the lien of the state for taxes, and it ought not be made necessary that he travel hither and yon to protect these liens. There is already too great an expense in the maintenance of our governments. As long as he is acting according to law, and as long as the validity or legality of

his taxes have not been attacked in any manner, either provided by the law of the State of Ohio or provided in the bankruptcy law as enacted by Congress, why is there any reason now for placing an additional burden upon him? Since the law of the State of Ohio provides that the lien of taxes shall be a lien which shall remain on the property until paid,[10] is it necessary now to declare that law controversial or invalid, solely to extend the authority of the bankruptcy court?

Purchasers Required to Know Law.

20. The purchaser of property from the bankruptcy court is as clearly acquainted with the law as is the county treasurer. The purchaser knows that the State of Ohio provides a lien upon the property for its taxes. The purchaser knows that if those taxes are not paid the lien is not removed. The purchaser is in position to bid or not to bid, and to determine the amount of his bid according to his own desires. If the property is not worth the taxes, he need not bid; and the court may, as in past instances, abandon the property. As a matter of law, the purchaser can protect himself with much less expenditure of time and money than can the county treasurer, if the treasurer be required to keep a supervisory eye always on the referee in bankruptcy.

Summary of Principles.

21. The summary of the principles in this case is this: The county treasurer ought not be required to watch the referee to see that no mistake is made by the bankruptcy court. The referee ought not (and we believe was never intended to) have the power to make a mistake affecting so seriously the State's lien for its revenues. The State, from

[10] Section 5671, Ohio General Code.

its sovereign character, ought to (and we believe does) have the undisputed power to levy and secure its recompense from the property within its borders, over which it has the supreme authority. To maintain these rights in the State will not affect the rights of a purchaser at a bankruptcy sale, nor will it increase or diminish the value of the property. The private creditor ought not benefit himself to the detriment of the State. And, to magnify and dignify the mistake of a referee to a power to deprive the State of its rights, is unnecessary and unprecedented either in law or in practice.

Conclusion.

22. Now, if the Court please, we may have failed to present the sovereign claims of the State of Ohio in as forceful and as clear a manner as their character deserves. We may have failed to impress this Court with the importance of the decision in this case to the state governments. If the laws laid down by the legislature of the State of Ohio, or as enacted by the Congress of the United States provided for a situation wherein the state must meet its subjects on a common and non-controversial ground, and defend its right to existence against the claims presented by its subjects, where there exists no dispute whatever of its rights, we would assume there is no remedy in this case. But, when the decision must be based solely on the extension of the authority of the federal court to sell property "free and clear of encumbrances," and, when that extension of authority invests the officers of the federal court with the right to cancel admittedly valid revenues of the sovereign state of Ohio, we believe that this Supreme Court ought to reconsider its decision. There is good reason why the lien of the state for taxes is different in character from the lien of the private debts of

its subjects. There is good reason why even the bankrupt's property should pay its taxes before paying its debts to private creditors. And, the fundamental basis of our position consists in the belief that the sovereign state must be protected, and that its right to collect revenues for its perpetuation is a right, separate and superior, to the rights of its subjects to collect their private debts.

Request for Rehearing.

23. Since, therefore, the State of Ohio has provided that the only method of attacking taxes is by the bringing of an action to enjoin their collection, on the ground of their illegality; since the State of Ohio has provided no method whatever for attacking its lien upon the real estate within its borders for the security of its taxes; since the treasurer of a political sub-division of a state has a right to rely upon the federal courts within that state, following the laws of the State of Ohio; since the Bankruptcy Act of Congress provides for the protection of taxes of the state, and provides no method whereby the lien of the state for taxes may be removed from the property; since there is a difference, and a fundamental and important difference between taxes and ordinary debts, as decided numerous times by this Supreme Court; and since there is no necessity for the extension of the powers of the Bankruptcy Court in its equity jurisdiction to sell property free of the lien of the state for taxes; we again respectfully submit to this Court that the previously announced decision is wrong —that this Court has not considered the importance and revolutionary character of this new federal power to the sovereign State of Ohio,—and that, therefore, a re-hearing ought to be granted in this case, and further consideration given these matters, before such a radical change in the

division of powers between the State and Federal Governments is finally adopted.

Respectfully submitted,

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Certificate of Good Faith.

I, G. H. BIRRELL, Prosecuting Attorney of Trumbull County and counsel for respondent, hereby certify that this application for re-hearing is presented in good faith and not for delay, but because I believe a rehearing ought to be had upon the decision in this case.

Signed: G. H. BIRRELL.